

SB2801



99TH GENERAL ASSEMBLY

State of Illinois

2015 and 2016

SB2801

Introduced 2/17/2016, by Sen. John G. Mulroe

SYNOPSIS AS INTRODUCED:

New Act

Creates the Insured's Independent Counsel Act. Provides that if an insurer has a duty to defend an insured under a policy of insurance and a significant and actual conflict of interest arises that imposes a duty on the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to the insured unless the insured waives the right to independent counsel in writing. Defines "significant and actual conflict of interest". Adds provisions governing: the selection of independent counsel; retention of other counsel by either insurer or insured; duties of the independent counsel; privileged information; waiver of the right to select independent counsel; and cooperation between the insurer, insured, and independent counsel.

LRB099 16796 EGJ 41143 b

A BILL FOR

1 AN ACT concerning insurance.

2 **Be it enacted by the People of the State of Illinois,**
3 **represented in the General Assembly:**

4 Section 1. Short title. This Act may be cited as the
5 Insured's Independent Counsel Act.

6 Section 5. Provision of independent counsel required.

7 (a) If an insurer has a duty to defend an insured under a
8 policy of insurance and a significant and actual conflict of
9 interest arises that imposes a duty on the insurer to provide
10 independent counsel to the insured, the insurer shall provide
11 independent counsel to the insured as provided in this Act
12 unless the insured waives the right to independent counsel in
13 writing.

14 (b) For purposes of this Act, "significant and actual
15 conflict of interest" means an insurance policy coverage issue
16 upon which the insurer has reserved its rights and that the
17 outcome of that insurance policy coverage issue can be
18 controlled by the insured's counsel's defense of the lawsuit. A
19 "significant and actual conflict of interest" does not include:

20 (1) claims or facts in a civil action for which the
21 insurer denies coverage;

22 (2) the mere issuance of a reservation of rights letter
23 by the insurer;

- 1 (3) a claim of damages in excess of the policy limits;
2 (4) a claim of punitive damages; or
3 (5) any other conflict that is not significant and
4 actual.

5 Section 10. Independent counsel selection.

6 (a) If a significant and actual conflict of interest arises
7 that requires appointment of independent counsel, the insurer
8 shall provide the insured with a list of 3 attorneys who are
9 independent of the insurer's approved law firm panel and meet
10 the criteria set forth in subsection (b). The insured must
11 either select one attorney from the list or select alternative
12 counsel of its choosing who also meets the criteria set forth
13 in subsection (b) to defend the insured.

14 (b) Independent counsel retained under this Act must have:

- 15 (1) significant defense litigation experience in the
16 general subject areas at issue in the civil action; and
17 (2) malpractice insurance.

18 (c) The insurer may also require that the independent
19 counsel follow any guidelines the insurer has in place for
20 counsel it retains in the defense of similar civil actions in
21 the ordinary course of business. The obligation of the insurer
22 to pay the fee charged by the independent counsel is limited to
23 the rate that is actually paid by the insurer to an attorney in
24 the ordinary course of business in the defense of a similar
25 civil action in the community in which the claim arose or is

1 being defended. In providing independent counsel, the insurer
2 may not be responsible for the fees and costs of defending an
3 allegation for which coverage is properly denied and may only
4 be responsible for the fees and costs to defend those
5 allegations for which the insurer either reserves its position
6 as to coverage or accepts coverage. The independent counsel
7 shall keep detailed records allocating fees and costs
8 accordingly. Nothing in this Section shall require the insured
9 to hire separate independent counsel to defend the insured for
10 counts for which coverage has been properly denied. Independent
11 counsel may defend the insured on all counts filed against the
12 insured.

13 (d) An insurance policy may contain a provision that
14 provides a method of selecting independent counsel which
15 complies with this Section.

16 Section 15. Other counsel. Any counsel the insured may
17 retain in addition to the independent counsel selected under
18 Section 10 of this Act shall be hired at the insured's sole
19 expense.

20 Section 20. Duties of independent counsel; privileged
21 information. Independent counsel hired under this Act shall
22 timely consult with the insurer on all matters relating to the
23 civil action and shall disclose to the insurer in a timely
24 manner all information relevant to the civil action, except

1 privileged information solely related to the significant and
2 actual conflict of interest. A claim of privilege is subject to
3 review in the appropriate court. Information disclosed by the
4 independent counsel or the insured to the insurer does not
5 operate as a waiver of any applicable privilege or work product
6 protection.

7 Section 25. Waiver of right to select independent counsel.
8 An insured may waive the right to select independent counsel by
9 signing a statement that reads substantially as follows: "I
10 have been advised of my right to select independent counsel to
11 represent me in this lawsuit and of my right under State law to
12 have all reasonable expenses of an independent counsel paid by
13 my insurer. I have considered this matter fully and at this
14 time I am waiving my right to select independent counsel. I
15 have authorized my insurer to select a defense counsel to
16 represent me in this lawsuit."

17 Section 30. Cooperation between insurer, insured, and
18 independent counsel. Independent counsel shall cooperate fully
19 in exchanging information that is consistent with ethical and
20 legal obligations to the insured. Nothing in this Act is
21 intended nor shall restrict independent counsel's exercise of
22 professional judgment in rendering legal services for the
23 insured or otherwise interfere with any ethical directive
24 governing the conduct of counsel. Nothing in this Act relieves

1 the insured of the duty to cooperate fully with the insurer as
2 required by the terms of the insurance policy.

3 Section 35. Insurer's counsel. The insurer has the right
4 to retain its own counsel in addition to the independent
5 counsel selected under Section 10 of this Act to associate in
6 and participate in all aspects of the lawsuit at the insurer's
7 own expense.